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No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1931

EX PARTE: THE STATE OF COLORADO, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR THE RESPONDENTS

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OPINION BELOW

The opinion of the District Court for the District of Colorado is not yet reported, but it is printed in full as an appendix (pp. 15–25) to the brief for the respondents in support of the response to the rule to show cause why leave to file the petition for a writ of mandamus should not be granted, heretofore filed in this case.

JURISDICTION

The jurisdiction of this Court is invoked under Section 234 of the Judicial Code (U. S. C., Title 28, Section 342).

QUESTION PRESENTED

Whether the facts stated in a petition to remove a criminal prosecution against a Federal prohibition agent from a State court to the Federal court under Section 33 of the Judicial Code were sufficient to sustain the respondents' refusal to remand the case to the State court.

STATUTE INVOLVED

Section 33 of the Judicial Code, as amended by the Act of August 23, 1916, c. 399, 39 Stat. 532 (U. S. C., Title 28, Sec. 76), provides, so far as material here:

> That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certifi-

> cate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. * * *

STATEMENT

On February 17, 1932, the State of Colorado presented a motion for leave to file a petition for a writ of mandamus against the respondents. On February 23, 1932, this Court entered an order directing a rule to issue requiring the respondents to show cause on or before March 14th why leave to file the petition for a writ of mandamus should not be granted. Accordingly, on March 14, 1932, the respondents filed a response to the rule to show cause, and also a brief in support of this response. Thereafter, on March 21, 1932, this Court granted leave to file the petition for a writ of mandamus and ordered that the respondents show cause upon printed briefs why the writ of mandamus should not issue as prayed. This brief is presented in response to this order.

The facts upon which the petition of the State of Colorado is based appear in the response to the

rule to show cause why leave to file the petition should not be granted, heretofore filed in this case. Accordingly they will not be repeated here.

SUMMARY OF ARGUMENT

The petition for removal contains a full and frank explanation of the petitioner's relation to the transaction involved in the proceedings in the State court, and indicates no purpose on his part to conceal any fact or circumstance which might tend to show that the act charged against him as a crime was performed otherwise than in the course of his official duties as a Federal prohibition agent. The allegations of the petition clearly negative the possibility that at the time he dealt the blow which resulted in the death of the deceased the petitioner was acting outside the scope of his official duties. The blow was struck in attempting to make an arrest under color of office. The petition therefore fully complies with the requirements for removal petitions under Section 33 of the Judicial Code as laid down by this Court in *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9.

It was not essential under the removal statute that the petition show that the act charged against the petitioner as an offense was *justified* by his official duty. It was enough that the act was done "under color of" the petitioner's office. An act is done "under color of office" when it is ostensibly done in the performance of the officer's duties and within the apparent scope of his authority. The

phrase "color of office" embraces a claim which may later turn out to be groundless, as well as a claim which on full investigation is shown to be well founded.

The objections that the petition showed that the petitioner used more force than was reasonably necessary to effect an arrest for a misdemeanor; that it failed to show that the deceased had knowledge of the petitioner's official capacity, or whether the deceased was a boy or a man, or of large or small physique, etc., all relate to the question whether the petitioner was justified by his Federal office in doing the act charged against him as a crime, rather than to the only issue which is involved in the present proceedings, namely, whether the act was done "under color of" his office.

ARGUMENT

In its petition for mandamus and supporting brief, the State of Colorado challenges the sufficiency of the petition for removal on the ground that it fails to comply with requirements for removal under Section 33 of the Judicial Code (*supra*, pp. 2–3). Apparently the substance of the State's contention is that the petition for removal must state facts sufficient to constitute a complete justification for the offense charged, in other words, facts which, if proved at the trial, would require a verdict of not guilty.

We think there is no warrant for such a narrow construction of the statute. Section 33 of the Judi-

cial Code provides for the removal of a criminal prosecution against an officer "on account of any act done under color of his office." In our brief in support of the response, heretofore filed in this case, we contended that Section 33 does not confine the right to removal to cases where the suit or prosecution in the State court is for an act which the officer was authorized or required to do by his Federal duty. We rely on the arguments advanced in the brief already filed, which may be reinforced by a further consideration of the meaning of the phrase "color of his office" as used in the statute.

This phrase includes acts which are done outside the scope of the officer's authority. Thus in *Swift Co.* v. *United States,* 111 U. S. 22, 30, this Court said: "If a person illegally claims a fee *colore officii,* the payment is not voluntary so as to preclude the party from recovering it back." Plainly, a person *illegally* claiming a fee is not acting within the scope of his authority, but this Court's language nevertheless shows that such an act may be done under color of office. A similar use of the phrase "color of office" appears in Section 85 of the Criminal Code (U. S. C., Title 18, Section 171). This section provides a penalty for every officer "who, under color of his office, * * * is guilty of extortion." Plainly, acts of extortion are not within the scope of any official authority but such acts may be done under "color of office."

In *Alcock* v. *Andrews,* 2 Espinasse 542, Lord Kenyon stated the distinction between acts done *virtute officii* and acts done *colore officii.* Acts done *virtute officii* are "where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him." But an act is done *colore officii* "where the act committed is of such a nature that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer."

A similar definition was given by the Court of Appeals of New York in *Decker* v. *Judson,* 16 N. Y. 439, 442. The court said:

> Color of office is defined as characterizing an act wrongfully done by an officer under the pretended authority of his office, and "grounded upon corruption, to which the office is a mere shadow of color."

Similarly, in *Burrall* v. *Acker,* 23 Wend. 606, 608, Chancellor Walworth said: "The words *color of office* necessarily imply an *illegal* claim of right * * * which claim is a mere color or pretence on the part of the officer."

Decisions of the State courts might be multiplied, but we believe it would serve no useful purpose. They are substantially unanimous in holding that acts are done under "color of office" when they are done under a pretense or claim of right,

even though they are in fact wholly unwarranted. See *Mobile County* v. *Williams,* 180 Ala. 639, 650–653; *Luther* v. *Banks,* 111 Ga. 374; *State* v. *Fowler,* 88 Md. 601; *Thomas* v. *Connelly,* 104 N. C. 342; *Smith* v. *Patton,* 131 N. C. 396.

CONCLUSION

The case was properly removed to the Federal court. A writ of mandamus should not be issued.

Respectfully submitted.

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